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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/880,199	06/13/2001	Cornelis Theodorus Verrips	F7544(V)	6098

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EXAMINER

HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 06/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/880,199

Applicant(s)

VERRIPS, CORNELIS  
THEODORUS

Examiner

Keith Hendricks

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 13 December 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 5,6,12-14,19 and 21-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 14,19 and 22 is/are allowed.
- 6) ☒ Claim(s) 5,6 and 23-27 is/are rejected.
- 7) ☒ Claim(s) 12,13 and 21 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 12-16-04.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Continued Examination Under 37 CFR 1.114*

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after allowance or after an Office action under *Ex Parte Quayle*, 25 USPQ 74, 453 O.G. 213 (Comm'r Pat. 1935). Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, prosecution in this application has been reopened pursuant to 37 CFR 1.114. Applicant's submission filed on December 13, 2004 has been entered.

### *Claim Objections*

Claims 12-13 and 21 are objected to under 37 CFR 1.75(c) as being in improper form because claims 12-13 depend from canceled claim 8, and claim 21 depends from canceled claim 1. It cannot be ascertained from which claims these were intended to depend, and thus accordingly, the claims 12-13 and 21 have not been further treated on the merits.

### *Claim Rejections - 35 USC § 112*

i) The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 5-6 and 23-27 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The specification describes the instant process utilizing the known step of pasteurization. However, the phrase "such as would be obtained by pasteurization" is not properly supported by the specification. Note that this phrase appears in new claims 24-25, yet claim 26 actually recites the step of pasteurization, and thus applicant must intend for some difference in scope between the two phrases. This

Art Unit: 1761

phrase appears to broaden the scope of the original disclosure. Applicant has provided no basis of comparison, nor any specific properties for which this state of bacteria may be present. The originally-filed specification does not address the phrase “as would be obtained by pasteurization”, nor does it disclose which method steps and resultant effects are encompassed, apart from actual pasteurization.

It is noted that applicant has provided references in the recent IDS, in an apparent attempt to distinguish between the effects of a “heat treatment step” and “pasteurization.” However, applicant has not specifically addressed these references, nor linked them to any particular part of the instant invention. It is noted that pasteurization *is* a heat treatment step (see pg. 504, col. 1 of the “Preservation” article). Regardless of the outside references applicant supplies, the originally-filed disclosure does not support the current claim language.

ii) The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 23-27 and 5-6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 23-25, the phrase “such as would be obtained by pasteurization” renders the claims indefinite, as applicant has provided no basis of comparison, nor any specific properties for which this state of bacteria may be present. It is unclear as to what method steps and resultant effects are encompassed by this phrase, apart from actual pasteurization. Applicant has not defined the phrase, and the phrase does not find support in the originally-filed specification. In contrast, claim 26 – dependent upon claim 24 – states that “the non-viable bacteria are obtained by pasteurization”, and thus it appears that applicant is making a direct attempt to obscure the metes and bounds of the claimed invention regarding the language of claims 24-25. This also renders dependent claims 23, 26-27 and 5-6, indefinite as well.

Further, it is noted that claim 25 fails to further limit claim 24, as this does not provide any actual, tangible property, versus one which “would be obtained” if certain procedures were undertaken, or possibly other unspecified method steps.

Art Unit: 1761

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 5-6 and 24-27 are rejected under 35 U.S.C. 102(b) as being anticipated by Meister et al. (US PAT 6,010,725).

Meister et al. is herein incorporated as cited at page 6 of the February 25, 2004 Office action. Absent any clear and convincing evidence and/or arguments to the contrary, the referenced methods meet the instant claim limitations. Further, applicant's claims 24-27 and 5-6 are unsupported by the specification for the phrase "such as would be obtained by pasteurization," and thus this also makes comparison of the claimed invention to the prior art, difficult.

Claims 5-6 and 24-27 are rejected under 35 U.S.C. 102(b) as being anticipated by Lee et al. (US PAT 3,794,739).

Lee et al. is herein incorporated as cited at page 5 of the February 25, 2004 Office action.

Absent any clear and convincing evidence and/or arguments to the contrary, the referenced methods meet the instant claim limitations. Further, applicant's claims 24-27 and 5-6 are unsupported by the specification for the phrase "such as would be obtained by pasteurization," and thus this also makes comparison of the claimed invention to the prior art, difficult.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1761

Claims 6 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Froseth et al. (US PAT 6,592,915, in view of Meister et al.

The references and rejection are herein incorporated as cited at pages 6-7 of the February 25, 2004 Office action, as previously applied to claims 21-23. Further, as applicant's claim 6, 23 and 24 are unsupported by the specification for the phrase "such as would be obtained by pasteurization," this also makes comparison of the claimed invention to the prior art, difficult.

\*\*\* The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

#### *Allowable Subject Matter*

Claims 14, 19 and 22 are (i.e. remain) allowed, as previously indicated on the Notice of Allowance dated September 13, 2004.

#### *Conclusion*

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (571) 272-1401. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
**KEITH HENDRICKS**  
**PRIMARY EXAMINER**